IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 205 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES YES

2. To be referred to the Reporter or not?: YES, but only in (U.J.) Portion of G.L.R. and G.L.H.

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

MANUBHAI MANGALDAS SHAH

Appearance:

MR.BD DESAI, APP, for State-appellant

NOTICE SERVED for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

Date of decision: 20/02/2004

ORAL JUDGEMENT

Instant appeal for enhancement of sentence, filed under Section 377 of the Code of Criminal Procedure,

1973, is directed against judgment dated January 13, 1992, rendered by the learned Judicial Magistrate, First Class, Lakhtar, District : Surendranagar, in Criminal Case No.144 of 1991, by which the respondent is convicted of the offence punishable under Section 94 of The Factories Act, 1948 ("the Act" for short) for contravention of Rule 3-A of the Gujarat Factories Rules, 1963 ("the Rules" for short) for second time and imposed sentence of fine of Rs.275/-, in default, S.I. for 15 days.

2. The respondent is owner of Gujarat Ginning Industries located at Station Road, Lakhtar, which is a factory within the meaning of Section 2(m)(i) of the Act. He is occupier of the factory and is in management of the same. The Factory Inspector, Surendranagar had visited the factory of the respondent on May 15, 1991 and found that the respondent was using building as factory without obtaining previous permission, in writing, of the Chief Inspector of Factories. The use of building or premises as factory without obtaining previous permission, in writing, of the Chief Inspector of Factories is contrary to Rule 3-A of the Rules. Therefore, the Factory Inspector had filed complaint in the Court of learned Judicial Magistrate, First Class, Lakhtar, District : Surendranagar against the respondent, which is on record of the case at Exh.1. In the complaint it was, inter alia, mentioned that Mr.N.H.Mehta, who was Junior Factory Inspector, had visited the factory of the respondent on March 19, 1990 and found that the respondent was using building as factory without obtaining previous permission, in writing, of the Chief Inspector of Factories and had, therefore, filed complaint in the Court of learned Judicial Magistrate, First Class, Lakhtar, which was registered as Criminal Case No.81 of 1990, in which by order dated November 13, 1990 the respondent was sentenced to fine of Rs.100/-. Under the circumstances, it was prayed in the complaint that as the respondent was previously convicted of an offence punishable under Section 92 and was again guilty of an offence involving contravention of the same provision, enhanced penalty as contemplated by Section 94 of the Act should be imposed on him.

3. The complaint filed by the Factory Inspector, Surendranagar on August 12, 1991 was registered as Criminal Case No.144 of 1991, and process was ordered to be issued to the respondent. On service of process, the respondent had submitted a purshis at Exh.9 on January 13, 1992 stating, inter alia, that he had committed breach of provisions of Rule 3-A of the Rules and

appropriate order be passed after showing mercy on him. The learned Judicial Magistrate had recorded plea of the respondent and the respondent had admitted that offence punishable under Section 94 of the Act was committed by him. It was noticed by the learned Magistrate that the respondent had admitted guilt willingly and without any coercion and that he had requested to show mercy while imposing sentence. Ultimately, the learned Magistrate imposed sentence of fine of Rs.275/-, in default, S.I. for 15 days by judgment dated January 13, 1992, which has given rise to instant appeal.

4. Mr.B.D.Desai, learned Additional Public Prosecutor, argued that the complaint was self-explanatory wherein it was clearly mentioned that the respondent, who was convicted of the offence punishable under Section 92 of the Act, was again guilty of an offence involving contravention of the same provision and, therefore, having regard to the salutary provisions of Section 94 of the Act, enhanced punishment as contemplated therein should have been imposed on the respondent. According to the learned Additional Public Prosecutor, the learned Magistrate failed to take into consideration the fact that the respondent had deliberately contravened provisions of Rule 3-A of the Rules and, therefore, lenient view taken by the learned Magistrate in the matter of imposition of sentence deserves to be deprecated. What was maintained was that the respondent was found guilty for contravention of provisions of Rule 3-A of the Rules for second time and as no genuine or convincing grounds were pleaded by him for taking lenient view, imposition of less than minimum fine prescribed in Section 94 of the Act, by the learned Magistrate should not be regarded as proper. It was argued that though the respondent was convicted for contravention of Rule 3-A of the Rules for using building as factory, without obtaining previous permission, in writing, of the Chief Inspector of Factories, by order dated November 13, 1990, the said breach was continued even thereafter and having regard to recalcitrant attitude of the respondent, less than minimum fine should not have been imposed on the respondent. According to the learned A.P.P., the learned Magistrate has thoroughly misconstrued the provisions of Section 94 of the Act and, therefore, the appeal should be accepted.

5. Though the respondent is duly served, he has neither appeared in person nor through his lawyer.

6. This Court has considered the submissions advanced at the Bar and the whole record of the case.

The fact that Mr.N.H.Mehta, who was Junior Factory Inspector, had visited the factory of the respondent on March 19, 1990 and found that the building was used as factory, without obtaining previous permission, in writing, of the Chief Inspector of Factories and, therefore, a complaint was filed which was registered as Criminal Case No.81 of 1990 in the Court of learned Judicial Magistrate, First Class, Lakhtar, is not in dispute. It is also not in dispute that by judgment dated November 13, 1990 rendered in Criminal Case No.81 of 1990, the respondent was sentenced to fine of Rs.100/-. In fact, the plea recorded would indicate that it was admitted by the respondent that he had committed offence punishable under Section 94 of the Act, inasmuch as he was guilty of offence involving contravention of Rule 3-A of the Rules again. Under the circumstances, a question arises whether the learned Magistrate was justified in taking lenient view of the matter and imposing less than minimum fine prescribed under Section 94 of the Act. Section 94 of the Act reads as under :-

"94. Enhanced penalty after previous conviction:

(1) If any person, who has been convicted of any offence punishable under Sec.92, is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to three years, or with fine which shall not be less than ten thousand rupees, but which may extend to two lakh rupees, or with both:

Provided that the Court may, for any adequate and special reasons to be mentioned in the judgment, impose a fine of less than ten thousand rupees.

Provided further that where contravention of any of the provisions of Chapter-IV or any rule made thereunder or under Sec. 87 has resulted in any accident causing death or serious bodily injury, the fine shall not be less than thirty five thousand rupees in the case of an accident causing death and ten thousand rupees in the case of an accident causing serious bodily injury.

(2) For the purposes of sub-section(1), no cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently being convicted."

7. A bare reading of the Section quoted above makes it evident that if any person, who has been convicted of any offence punishable under Section 92, is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to three years, or with fine which shall not be less than ten thousand rupees, but which may extend to two lakh rupees or with both. It is true that Proviso (1)) to the said Section enables the Court to impose fine of less than ten thousand rupees, for adequate and special reasons to be mentioned in the judgment. However, the judgment impugned does not contain any reason much less adequate and special reasons, which according to the learned Magistrate had enabled him to impose fine of less than minimum except mentioning that mercy was pleaded by the respondent. An accused who is found guilty under Section 94 of the Act is bound to plead mercy. However, plea of mercy raised can hardly be regarded as adequate and special reason, within the meaning of proviso to Section 94 of the Act. The learned Magistrate would get jurisdiction to impose fine of less than minimum only if there are adequate and special reasons and not otherwise. The respondent in his purshis had merely requested the learned Magistrate to show mercy in the matter of imposition of sentence, but had failed to spell out adequate and special reasons for imposition of fine of less than minimum. Therefore, the learned Magistrate could not have exercised jurisdiction available to him under Proviso (1) to Section 94(1) of the Act and imposed fine of less than minimum. It was not the case of the respondent that for the circumstances beyond his control he could not obtain previous permission, in writing, of the Chief Inspector of Factories before using building as factory. No extenuating circumstances were pointed out for taking lenient view regarding sentence and, therefore, second contravention of Rule 3-A of the Rules could not have been viewed lightly. The record does not show that the respondent had assured that he would not repeat the offence in future. It was not pleaded by him that his financial condition was not good, nor it was established by him that at the time of imposition of sentence he had either obtained necessary permission as contemplated by Rule 3-A of the Rules or taken steps to secure permission contemplated by the said provision. Therefore, the learned Magistrate was not justified at all in imposing fine which is less than minimum prescribed in Section 94 of the Act. The sentence imposed on the respondent is ex-facie contrary to the provisions of the Section 94 of the Act and therefore,

this appeal for enhancement of sentence will have to be accepted.

8. For the foregoing reasons, the appeal succeeds. The conviction of the respondent of the offence punishable under Section 94 of the Factories Act, 1948 is maintained. The sentence of fine of Rs.275/-, in default, S.I. for 15 days imposed on the respondent by the learned Judicial Magistrate, First Class, Lakhtar, vide judgment dated January 13, 1992, in Criminal Case No.144 of 1991, is hereby enhanced and the respondent is sentenced to fine of Rs.10,000/- (Rupees Ten Thousand only), in default, S.I. for six months. The appeal accordingly stands allowed.

(J.M.Panchal,J.)

(patel)